

Reinstatement of foreign exchange controls Decree N° 609/2019 – Communication BCRA N° 6770

The purpose of this report is to briefly summarize the foreign exchange (“FX”) control restrictions set forth by Decree N° 609/19 (published in the Official Gazette on September 1, 2019) (the “Decree”) and Communication “A” 6770 of the Argentine Central Bank (“BCRA”) dated September 1, 2019. Although certain differences exist, with the issuance of these regulations many of the FX restrictions in place in 2015 have been reinstated.

The new regulations leave various issued unsolved. In many cases, it is not clear whether the BCRA authorization requirement is set forth as a mere formality that will allow the BCRA to control the purchase of foreign currency or if, on the contrary, it will require compliance with substantive conditions.

As a result, and as it is customary in situations of significant changes in the FX regulatory framework, it is reasonable to expect the issuance of new regulations in the days to come.

1. Decree N° 609/2019

As to FX matters (since it also covers sovereign debt related issues), the Decree:

- (i) Reinstates, until December 31, 2019, the obligation of exporters to repatriate the proceeds of the exports of goods and services, pursuant to the terms and conditions to be established by the implementing regulations to be issued by the BCRA.

Although the Decree refers both to the possibility of maintaining the export proceeds in foreign currency or converting them to Pesos, as further explained below, the Communication ignores the first option and requires exporters to convert the proceeds to pesos and deposit them in local bank accounts.

- (ii) States that the BCRA, in exercise of its powers, shall regulate the access to the FX market for the purchase of foreign currency and transfer thereof abroad. The implementing rules must be issued on the basis of objectives guidelines accounting for the FX market conditions and providing a different treatment for individuals and legal entities.
- (iii) Authorizes the BCRA to establish regulations preventing transactions aimed at circumventing the aforementioned restrictions, through bonds and other securities.

2. Implementing rules set forth under Communication “A” 6770 of the BCRA

As mentioned above, the Communication reinstates (in some cases, with certain differences) many of the FX controls in place in Argentine between 2002 and December 2015, with implications in various transactions.

2.1. Exports of goods

Following the reinstatement of the obligation to repatriate export proceeds under the Decree, the Communication sets forth some implementing regulations providing a different treatment in connection with exports registered until September 2, 2019 and those registered as from such date:

- (i) Export proceeds corresponding to exports registered as from September 2, 2019 must be repatriated to Argentina, converted to Pesos and deposited in a local bank account through the FX market, within the following maximum terms: (a) transactions with related parties and exports of goods corresponding to the custom tariff codes included in the first chart of the Annex of Resolution SC N° 57/2016¹ (commodities): 15 calendar days; and (b) other exports: 180 calendar days.

Although the Decree and the Communication do not establish this expressly, based on the historic regulations, we consider reasonable to construe that this term should be counted as from customs clearance of the relevant export.

In any case, notwithstanding the maximum terms mentioned above, this obligation will need to be complied within 5 business days as from payment, if earlier.

- (ii) In connection with exports registered prior to September 2, 2019 which payment is pending, the aforementioned obligations will need to be complied within 5 business days as from collection in Argentina or abroad.

Moreover, as an exception to the repatriation/conversion obligations, the Communication allows the application of the export proceeds to the repayment of:

- (i) pre-export financings granted or guaranteed by local banks,
- (ii) export advances, pre-export financings and export financings the proceeds of which were repatriated to Argentina, converted to pesos and deposited in local bank accounts and *provided that* the indebtedness was disclosed under the External Indebtedness Reporting Regime²; and
- (iii) financial loans entered into prior to August 31, 2019 providing for the repayment of debt services with the application of export proceeds.³

2.2. Export advances and pre-export financings

The Communication establishes the obligation to repatriate to Argentina, convert to Pesos and deposit in local bank accounts the proceeds of disbursements under export advances

¹ These include exports of, *inter alia*, cereals (some exceptions apply), seeds (some exceptions apply), soy oil, soy flour and pellets, minerals (some exceptions apply) and hydrocarbons (some exceptions apply).

² See section 2.4.2.

³ In general, the possibility of repaying financial indebtedness with the application of export proceeds has been an exception under the historic regulatory framework. Pursuant to the rules in effect until 2015, this possibility was only available for certain financial loans complying subject to quite stringent regulations. It is not clear whether such special regulations shall be reinstated under the new framework.

and pre-export financings, within 5 business days as from disbursement thereof in Argentina or abroad.

2.3. Export of services

The Communication reinstates the obligation to repatriate to Argentina, convert to Pesos and deposit in local bank accounts the proceeds of exports of services within 5 business days as from payment thereof in Argentina or abroad.

The Communication does not define the concept of “export of services”. It is not clear whether, for purposes of this obligation, the FX definition of export of services in place until 2015 shall be used, or whether the more restrictive definitions provided under customs regulations will be used (e.g. the definition in Decree N° 1201/2018 which established a temporary export withholding on exports of services).⁴

2.4. External financial indebtedness

2.4.1. Repatriation and conversion of proceeds of external financial indebtedness

The Communication reinstates the obligation to repatriate to Argentina, convert to Pesos and deposit in local bank accounts the proceeds of external foreign financial indebtedness disbursed as from September 1, 2019. Compliance with this obligation is a condition to the subsequent access to the FX market to repay the relevant debt.

The Communication does not establish a term to comply with this obligation. As a result, currently, the obligation must be complied at any time before accessing the FX market to repay the debt. The BCRA could resolve to establish a specific term to comply with this obligation in subsequent regulations (as it occurred prior to 2015).

2.4.2. External Indebtedness Reporting Regime

As from the end of 2017, the reporting regime for external indebtedness provided under Communication “A” 3602 was replaced by the External Assets and Indebtedness Reporting Regime regulated by Communication “A” 6401 as amended and supplemented.

Until the issuance of the Communication, and without prejudice that the reporting obligations were mandatory for certain companies, the reporting regime only had statistical purposes. This has changed since disclosure of the relevant debt under this reporting scheme is now a condition to access the FX market for purposes of repaying debt services or, as applicable, to apply export proceeds to the cancellation of export financings.

Moreover, although the Communication only refers to these two purposes (access to the FX market to repay debt services under external financial indebtedness or, as applicable, to apply export proceeds to the cancellation of pre-export financings), it is not clear

⁴ The referred decree defines export of services as “any rendering of services in the country... the effective use of which is carried out or enjoyed abroad”.

whether the reporting of the external commercial and financial indebtedness reporting will also be required for other purposes (e.g. deferred payment of imports, payments of dividends, etc.).

It is reasonable to expect that new regulations will be issued in the following days in order to adapt the reporting regime to the new FX controls.

2.4.3. Repayment of principal and interest under external financial indebtedness

The Communication does not require prior BCRA authorization to access the FX market for the repayment of debt services under external financial indebtedness at maturity and only requires that, to that end: (i) disbursements made as from September 1, 2019 must be repatriated to Argentina, converted to Pesos and deposited in a local bank account prior to repayment; and (ii) the corresponding indebtedness must be disclosed in accordance with the reporting regime described in 2.4.2 above.

As to prepayments of interest or principal, to the extent the prepayment is made no more than 3 business days in advance, no BCRA authorization is required (*provided that* the requirements mentioned in the preceding paragraph are met). Prepayments with an anticipation of more than 3 business days to the scheduled maturity are subject to BCRA authorization. The Communication does not establish any particular conditions for purposes of obtaining such authorization. Additionally, it is not clear to which prepayments will this limitation apply (all prepayments, voluntary prepayments, prepayments triggered other than for the borrower's default, etc.)

2.5. Payment of imports of goods and services

Payment of imports of goods are not subject to prior BCRA authorization, except in connection with payments of imports to related parties in excess of US\$ 2 million per month.

In the case of advanced payment of imports: (i) in order for the local resident to be able to access the FX market to that effect (a) the recipient of the transfer must be the foreign supplier and (b) the importer must present to the local bank the supporting documents; and (ii) the importer will be required to evidence before its local bank the effective import of the goods within 180 days following the advanced payment.

Considering the FX restrictions that were in place until 2015 and the requirements thereunder, the issuance of supplementing regulations may be expected in the short term clarifying certain issues and further detailing the formal requirements to be met for purposes of these transfers.

With regard to the payment of services⁵ abroad, no authorization is required *provided that* the payment is made to non-related foreign service providers.

⁵ If the current list of transactions published by the BCRA were to be considered, the "services" would include: maintenance and repair, freight, passenger transportation services, other transportation services, postal services, tourism and travel, construction, insurance premiums, insurance claims, auxiliary insurance services, financial services, telecommunication services, IT, information services, intellectual property, investigation and development services, legal, accounting and management services, advertising,

The Communication fails to (i) establish the requirements to obtain such approval, (ii) clarify whether any services are excluded, (iii) define the concept of related companies and (iv) clarify whether royalties are included within the rules applying to services (under the FX controls existing until 2015, royalties are subject to the same treatment as services generally).

It is likely that these conditions will be regulated or clarified by subsequent BCRA communications to be issued in the following days or by definition to other regulations or documents that the BCRA has historically used as reference in FX matters.

With regard to the prepayment of debts for imports of goods or services, access to the FX market is subject to BCRA approval. However, the Communication does not clarify the meaning of “debts for imports”. It is not clear whether any supplemental regulation will be issued and, in such case, whether the principles underlying the FX controls in effect until 2015 will be used.

2.6. Payment of dividends and corporate profits

Pursuant to the Communication, access to the FX market for the payment of dividends and corporate profits abroad shall be subject to BCRA approval. However, the Communication fails to establish the requirements applying to that effect.

Under the FX framework in effect until 2015, the regulations permitted access to the FX market for the payment of dividends and corporate profits abroad provided that the same resulted from closed audited financial statements. Despite the fact that the regulations were not amended, from 2012 to 2015 a *de facto* freeze on these payments was imposed by the government.

2.7. Access to the FX market by legal entities for savings and investment purposes

Pursuant to the Communication, Argentine-resident legal entities, provincial and municipal governments, mutual funds and local trusts require prior BCRA approval to purchase foreign currency and/or transfer the same abroad for the following purposes: (i) subscription of debt securities between affiliates, (ii) real estate investments abroad; (iii) other direct investments abroad; (iv) subscription of debt securities; (v) loans granted to non-Argentine residents; (vi) bank deposits abroad of Argentine residents, (vii) other investments abroad of Argentine residents, (viii) payment processing companies' transactions; (ix) purchases and transfers abroad of foreign currency for transactions between Argentine residents; and (x) constitution of guarantees for derivative transactions.

Many of these transactions were related to the concept of “*atesoramiento*” (savings/investments) largely used until 2015. In the past, following the reinstatement of

market research and surveys, architecture, engineering and technical services, operational lease services, commerce-related services, other business services, audiovisual services, personal, cultural and recreational services, government services. It is not clear whether this list of transactions will be amended in light of the new controls.

FX controls in 2002, the FX controls were gradually flexibilized (until 2012) establishing monthly maximum amounts applying to the access to the FX market by Argentine resident for these purposes. It is not clear whether this flexibilization will take place under the new controls and, if so, in which terms and subject to which amounts.

2.8. Access to the FX market by individuals for savings and investment purposes

With regard to the transactions mentioned in 2.7 above, plus family assistance, the Communication allows individuals to access the FX market to purchase foreign currency and/or transfer it abroad up to an amount of US\$ 10,000 per person (globally considering all concepts). Transactions in excess of this threshold shall be subject to BCRA approval. Purchases in excess of US\$ 1,000 may not be made in cash.

2.9. FX controls for payments between Argentine residents

The Communication prohibits access to the FX market for the payment of debts and other obligations denominated in foreign currency in transactions between Argentine residents executed as from September 1, 2019. It also clarifies that in connection with transactions instrumented through public registries or public deeds as of August 30, 2018 access shall be granted for payment thereunder at maturity.

It is important to clarify that the new regulations do not prohibit the execution of transactions denominated, or payments, in foreign currency, and are only limited to prohibiting access to the FX market for such purposes. In other words, if the Argentine residents already have freely available foreign currency funds in Argentina or abroad (i.e. funds not subject to mandatory repatriation), the same may be freely used to make payments to local residents.

This restriction is not novel. During 2002-2015 the regulations also prohibited access to the FX market for payments between Argentine residents and, therefore, individuals and legal entities resorted to the freely available funds purchased through the “*atesoramiento*” mechanics or to the purchase and subsequent sale of securities denominated in USD to avail themselves of foreign currency to make these payments.

It is not yet clear which will be the requirements or formalities to be complied in connection to pre-September 1 transactions.

2.10. Access to the FX market by non-Argentine residents

Non-Argentine residents require prior BCRA approval to access the local FX market to purchase and/or transfer foreign currency in excess of US\$ 1,000 per month.

In line with the exceptions in force during 2002-2015, the Communication excludes from this limitation the operations of: (i) international and export credit agencies; (ii) diplomatic and consular representations and diplomatic officers in exercise of its functions, and (iii) local representations of tribunals, authorities, offices, special missions, commissions and bilateral agencies under international treaties to which Argentina is a party provided that the transfers are carried out in exercise of its functions.

2.11. Contado con liquidación (acquisition or sale of foreign currency through the purchase/sale of securities)

With regard to these transactions, the Communication only sets forth certain limitations applying exclusively to local banks. In this regard it states that banks may not purchase securities in the secondary market with foreign currency. The communication does not limit these transactions in connection with individuals and/or entities other than banks.

Contado con liquidación transactions were largely used by local residents until 2015 to avail themselves of foreign currency for transactions restricted by the then existing FX controls or to sell foreign currency at more attractive FX rates than the ones offered in the “official” FX market.

2.12. Other considerations

Finally, the Communication establishes certain additional rules on formal matters and registration of transactions and clarifies that any breach to the FX controls shall be subject to the sanctions and proceedings under the Criminal Foreign Exchange Law N° 19,359.

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Do not hesitate to contact us in case you have any query or require additional information in these matters.

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